

1. Clarksburg , Ca, BDCP scoping meeting 4/30/2008.
2. Good Evening I am Bob Webber a long resident of Clarksburg and the Manager of Reclamation District 999. The District was formed on August 10, 1913 under the Reclamation Act of 1868. The District provides levee maintenance and operations for 33 miles of Federal project levees and Irrigation water to more than 25,000 acres ag lands. I have a history of Reclamation District 999 to be included in our public comments.
3. The District is very proactive in our use of environmentally friendly levee erosion control projects with the use of Brush Boxes, planting tulles grasses and willows along the waters edge. We installed a fish screen on our Sacramento river water diversion for protection of both delta smelt and salmon.
4. We are concerned with the habit restoration that would convert agricultural lands into tidal wet lands. The district early history is an area of Swamp and Overflow lands. This is very different than tidal wet land for the benefit of endanger fish.
5. We request that your EIR process clearly show your compliance with Federal and State Reclamation Law.
6. The restoration of Tidal wetlands will require the diversion of water. We request that the EIR process evaluate the current water rights laws and their application to the Bay Delta conservation Plan.

Thank you,

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## MEMORANDUM RE DIFFERENCE BETWEEN SWAMP AND OVERFLOWED LANDS AND TIDE LANDS

This is a Memo to differentiate between Swamp and Overflowed Lands, herein called S & O Lands, and Tide Lands. The essential difference is that Tidelands are subject to being washed by the daily tides. S&O Lands are subjected to overflow only at flood stages, not at high tides.

This Memo is prompted by the impression, incorrectly held by some, that the Sacramento-San Joaquin Delta, at the time of the original settlers, was a marsh which was subject to daily tidal overflow until the settlers began to construct levees to reclaim it and presumably to "create" islands. As shown below, that was not the case. Each island had a natural bank, like that of the Sacramento River, which kept out the tides, but were subject to overflow at high water stages. The tides were always against these banks, but the banks were high enough to keep out the high tides, but not the flood waters. Since they were "overflowed" they were no doubt generally "marshy", but were, as shown, subject to being reclaimed and cultivated.

Pieces of the natural banks of several of the Delta islands can be seen today and are referred to as "Channel islands." These are isolated pieces of the original island bank which were cut off at the time of reclamation where the original island came to a point which was too narrow to justify reclamation. The dredge then simply cut off this point and left a channel resulting from the dredge cutting through it. These "Channel islands" (remnants of the original island banks) are not covered by high tides, but only by flood flows.

### SWAMP AND OVERFLOWED LANDS

The source of the S&O Lands is in the Congressional Act of Sept. 28, 1860. This is called the "Arkansas Act" as it specifically involves land in the State of Arkansas. It was adopted to enable Arkansas to construct "the necessary levees and drains to reclaim the swamp and overflowed lands therein" which had been "made unfit thereby for cultivation." Section 4 of this Act, however, extends the provisions and benefits of the Act to "each of the other States of the Union", hence California.

The Secretary of the Interior is directed in the Arkansas Act to "make out an accurate list and plats of the lands" referred to as S&O lands, and transmit the list and plats to the governor and "cause a patent to be issued to the State therefor" to vest the land in the State of Arkansas subject to disposal by the legislature, provided that "the proceeds of said lands shall be applied, exclusively, as far as necessary, to the purpose of reclaiming said lands by means of the levees and drains."

The California Legislature quickly picked up on this opportunity to acquire ownership from the federal government of all S&O lands and to apply the proceeds from their sale to reclaiming these lands "by means of levees and drains." The first such act was adopted by the California Legislature on May 13, 1861. It provided for the "Reclamation and Segregation of Swamp and Overflowed, and Salt Marsh and Tide Lands, donated to the State of California by Act of Congress." The Arkansas Act does not refer to Marsh Lands or Tide Lands. Clearly, however, the reclaiming of the lands along the Sacramento River and in the Delta was made possible by this Congressional Act and the Legislative Acts which followed it.

Several Acts of the California Legislature followed, on May 14, 1861, April 25, 1863, April 27, 1863, March 24, 1864 and April 2, 1868. It is of interest that the Act of April 27, 1863 refers to the S&O Lands "granted to the State by Act of Congress of September 28, 1850" and to the "Tide Lands belonging to the State by virtue of her sovereignty." This provides the distinction between Tide Lands and S&O Lands. Where the "sovereign" title of the State to the Tide Lands is derived is not defined, but the distinction is clear.

These Acts of the Legislature provide for the sale of the S&O Lands and the formation of a Board of Swamp Land Commissioners to oversee the use of the funds for reclamation. In 1868 this was all succeeded by the Reclamation District Act which authorizes the Counties to approve the

formation of local districts to receive the funds from the sale of the S&O Lands, through the Office of the State Treasurer, and to apply them to the construction of the necessary levees and drains. That is how the reclamation of the Delta was accomplished through the elevation of the natural banks of the islands to attempt (not always successfully) to protect them from the periodic overflow from high water.

The surveying of the S&O Lands was done by the State Surveyor General, predecessor of the State Lands Commission, in conjunction with the US Surveyor - General for California. Such a survey of Delta lands was completed and dated February 14, 1872. A copy is available from the California State Lands Commission. The 1872 survey of "Notoriously Swampy and Overflowed" lands shows the Delta configuration of sloughs and islands essentially as it remains today.

Deeds to lands within the Delta invariably contain descriptions which show the parcel to be a portion of Swamp and Overflowed Survey No. \_\_\_\_\_. These would have been individual surveys, with individual numbers, prepared by State surveyors after the 1872 federal map was approved.

There should therefore be no question as to the condition of the Delta islands when California became a State. They existed essentially as they do now, but at that time with natural banks which held out the daily tides but were able to be overtopped by periodic seasonal high flows.

Unfortunately, the recent Report of the Corps of Engineers to Congress regarding Delta levees refers to the islands as having originally been "tidal marshlands." This could imply that they were "marshlands" subject to the daily tides. That clearly does not provide an accurate impression as to the condition of the Delta islands as of 1850 or now. The tides obviously rose and fell on the outside of the islands against the islands' natural banks. The islands' interiors, however, were no doubt marshy to a great extent, and probably filled with tules, but were not subject to daily tides as are "Tide Lands."

## TIDE LANDS

Tide Lands, which are subject to daily tides, are not generally able to be conveyed into private ownership and even when this occurs are subject to an easement for navigation by the public. This occurred when Frank's Tract was flooded in 1938. The levees have never been repaired. The land within the island, covered by tidewater, is still owned privately, but is subject to a "navigation easement" for the public. See *Bohn vs. Albertson*, 107 Cal. App. 2d 738 (1951).

The first case analyzing the distinction between S&O Lands and Tide Lands is *The People of California v. Morrill*, 26 Cal 336 (1864). This case discusses the source of the State's title to the S&O Lands through the Arkansas Act. It points out that Arkansas had many such lands subject to periodic overflow, but due to its distance from the sea, no "tidelands." The court points out that California has a large quantity of swamp and overflowed lands "upon the Sacramento and San Joaquin Rivers." It also has a quantity of other lands which are overflowed in part by the ordinary high tides and therefore, as to that part "belong to the State by virtue of her sovereignty."

This "sovereignty" is derived, according to this 1864 case, from the English common law that the tidelands or "seashore" are "deemed to be public property for the free and common use of all" and "the king cannot divert it from this purpose." Why the "king" in this case is the State and not the federal government is not explained. It does, however, identify those lands which are subject to periodic overflow, and not daily tides, as having been acquired from the federal government under the Arkansas Act, separate and distinct from "tidelands." Those S&O lands, including the Delta islands, were subsequently conveyed by the State into private ownership for "reclamation" pursuant to the several legislative Acts referred to above.

George Basye